

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHRYN TOWNSEND GRIFFIN, HELEN
MCDONALD, and THE ESTATE OF CHERRIGALE
TOWNSEND,

Plaintiffs,

-against-

EDWARD CHRISTOPHER SHEERAN, p/k/a ED
SHEERAN, ATLANTIC RECORDING
CORPORATION, d/b/a ATLANTIC RECORDS,
SONY/ATV MUSIC PUBLISHING, LLC, and
WARNER MUSIC GROUP CORPORATION, d/b/a
ASYLUM RECORDS,

Defendants.

ECF CASE

17-cv-5221 (RJS)

DEFENDANTS' RESPONSE TO PLAINTIFFS'
"ADDITIONAL STATEMENT OF RELEVANT FACTS"

Defendants object to the "Additional Statement of Relevant Facts" as improper and inconsistent with Local Rule 56.1 because Plaintiffs put forth a statement of "undisputed facts" whereas Local Rule 56.1(b) only permits the non-movant to include a "short and concise statement of additional material facts as to which it is contended that there exists a genuine issued to be tried" – *i.e.*, the non-movant may identify material facts it contends are in dispute, but it may not submit its own version of undisputed facts. Subject to, and without waiver of this objection, Defendants respond as follows:

205. In 1973, Ed Townsend wrote the musical composition, Let's Get It On. (Farkas Dec at Exh. 12)(Dkt. No. 67-12, p. 7 of 12; McDonald Tr., p. 23:4-25:14).

Response: Undisputed.

206. The copyright application and registration for Let's Get It On is dated July 17, 1973. (Frank Dec., Exh. 12). (Farkas Dec at Exh. 12)(Dkt. No. 67-12, p. 7 of 12).

Response: Disputed. The registration is dated July 17, 1973 and the application was “received” on July 17, 1973; the application does not indicate when it was submitted. Defendants further note that the application identifies the date of first publication of the sheet music for LGO as February 14, 1973. *See Farkas Decl. Ex. 12.*

207. Let’s Get It On features a unique selection, coordination and arrangement of elements, specifically (a) I-iii-IV-V harmonic progression; (b) harmonic rhythm of anticipated second and fourth chords; (c) a basic bass line of 1-3-4-5; (d) drum part that consists of 8 eighth notes on the closed hi-hat, accented snare drum on beats 2 and 4, and bass or “kick” drum on “1” and syncopated on the “and” of two and the “and” of three and “4”; (e) in the key of E flat major; (f) tempo of 82 beats per measure. (Stewart Dec. ¶ 47)

Response: Disputed. Defendants object to the statement that LGO features a “unique selection, coordination and arrangement of elements” because it is a pure legal conclusion (and it is irrelevant in any event because the issue on this motion is not whether LGO, as a whole, is entitled to protection). Defendants specifically dispute that the drum part of the LGO Recording consists wholly of 8 eighth notes on the closed hit-hat; the hi-hat component consists of eighth notes on closed and “open” hi-hat. *See Ferrara Report p. 5; Stewart Report p. 6.* Defendants further dispute this statement because the LGO Deposit Copy does not include a bass-line, it does not include drums and it does not specify the tempo with which to perform the composition (and tempo is not protectible as a matter of law). *See Ferrara Decl. ¶¶ 4, 47; Reply Ferrara Decl. ¶¶ 11, 19, 22.*

Defendants do not dispute (1) that LGO features a variation of the I-iii-IV-V harmonic progression (which is commonplace, *see Ferrara Decl. ¶¶ 6-7; Reply Ferrara Decl. ¶ 3*), (2) that LGO has a harmonic rhythm of anticipated second and fourth chords

(which is a commonplace musical technique, *see* Ferrara Decl. ¶ 8; Reply Ferrara Decl. ¶¶ 6-7), (3) that the drum part (not included in the LGO Deposit Copy but only in the LGO Recording) consists of snare drum hits on beats 2 and 4, and bass or “kick” drum hits on “1” and syncopated on the “and” of two and the “and” of three and “4” (the aforementioned percussion elements, individually and in the aggregate, were commonplace prior to LGO, *see* Ferrara Decl. ¶ 47; Reply Ferrara Decl. ¶¶ 19-21), (4) that LGO is written in the key of E flat major (which is not the same key as TOL, *see* Ferrara Decl. ¶ 5, and key is not protectible as a matter of law), and (5) that the LGO Recording is recorded at 82 beats per minute (tempo is not protectible as a matter of law, the LGO Deposit Copy does not specify the tempo with which to perform the composition, and TOL has a different tempo, *see* Ferrara Decl. ¶¶ 4, 16).

Defendants further clarify that Stewart has transcribed the bass-line in the LGO Recording as 1-3-3-4-5-5-5-6. *See* Stewart Report p. 4.

208. Thinking Out Loud also features (a) I-iii-IV-V harmonic progression; (b) anticipated second and fourth chords; (c) a basic bass line of 1-3-4-5; (d) drum part that consists of 8 eighth notes on the closed hi-hat, snare drum on beats 2 and 4, and bass or kick drum on bass or “kick” drum on 1 and syncopated on the “and” of two and the “and” of three; (e) in the key of D major; (f) tempo of 79 beats per minute. (Stewart Dec. ¶ 47)

Response: Disputed. TOL does not feature a I-iii-IV-V harmonic progression; rather, certain segments of TOL feature a similar, but not identical, harmonic progression. *See* Ferrara Report ¶¶ 23-24; Ferrara Decl. ¶ 6; Reply Ferrara Decl. ¶ 4.

Defendants do not dispute (1) that the drum part in TOL features 8 eighth notes on the closed hi-hat, snare drum hits on beats 2 and 4, and bass or kick drum hits on the bass

or “kick” drum on 1 and syncopated on the “and” of two and the “and” of three (other differences with the drum part in the LGO Recording exist such as “open” hi-hat eighth notes in the LGO Recording and a bass or “kick” drum on beat 4 in the LGO Recording that are not in TOL, and each of the allegedly similar elements is and was commonplace, *see* Ferrara Decl. ¶ 47; Reply Ferrara Decl. ¶¶ 19-21), (2) that portions of TOL have anticipated second and fourth chords (which is a commonplace musical technique, *see* Reply Ferrara Decl. ¶ 7), (3) that TOL is in the key of D major (which is not the same key as LGO, and key is not protectible as a matter of law, *see* Ferrara Decl. ¶ 16) and (4) TOL has a tempo of 79 beats per minute (tempo is not protectible as a matter of law, the LGO Deposit Copy does not specify the tempo with which to perform the composition, and the LGO Recording has a different tempo, *see* Ferrara Decl. ¶¶ 4, 16).

209. The difference between the drum parts in LGO and TOL is two bass drum notes. (Stewart Dec. ¶ 48).

Response: Disputed. To the extent “LGO” refers to the LGO Recording, there are two syncopations in the kick drum in TOL but there is only one syncopation in the kick drum in the LGO Recording. *See* Ferrara Report p. 26; Stewart Report p. 6. The LGO Deposit Copy does not include a drum part. *See* Ferrara Decl. ¶ 4. Defendants further clarify that it is undisputed that each constituent element of the drum pattern in LGO was in common use prior to LGO, and that the drum pattern as a whole existed prior to LGO. *See* Ferrara Decl. ¶ 47; Reply Ferrara Decl. ¶¶ 19-21.

210. Open hi-hats are notated differently than closed hi-hats. (Stewart Dec. ¶ 50).

Response: Disputed. Open hi-hats and closed hi-hats are both notated with the same “x” note heads and on the same line of the musical staff; the only difference is that a circle is placed over an open hi-hat note. *See Ferrara Report p. 25; Stewart Report p. 6.*

211. Rim clicks are notated differently than snare drum hits. (Stewart Dec. ¶ 50).

Response: Disputed. Rim clicks are often notated with the same note head and virtually always on the same space on the musical staff as snare drum hits. *See Ferrara Report at Visual Exhibit I.*

212. Open hi-hats have and ride cymbals have more legato (note duration) than closed hi-hats. (Stewart Dec. ¶¶ 50-51).

Response: Undisputed. However, the difference in duration between open hi-hat and ride cymbals as compared with closed hi-hats in the drum beats at issue is less than $\frac{1}{4}$ of a second and the impact of the metric placement of the attacks is more important to the rhythm. *See Reply Ferrara Decl. ¶ 20.*

213. Thinking Out Loud has no pitch “D” on the second chord for the first 24 seconds of the recording. Stewart Dec. ¶ 9; Farkas Dec., Exh. 3 (Ferrara Report, Musical Example 1 on P-17.)

Response: Undisputed.

214. The combination of notes F# and A and absence of D (the root) strongly indicate that this chord should be analyzed as F# minor (as in LGO). (Stewart Dec. ¶ 8).

Response: Disputed. Dr. Stewart’s own transcriptions contradict this new assertion; in example 3 of the Stewart Report (Frank Decl. Ex. 14), Dr. Stewart depicts the second chord in TOL as a “D/F#” – which is a “I/3” chord and not a “iii” chord. *See Reply*

Ferrara Decl. Ex. 23, Demonstrative Ex. 1. In his transcription of the “full score” to TOL (Frank Decl. Ex. 6), Dr. Stewart does the same. *Id.* Demonstrative Ex. 2.

215. In an email dated April 1, 2015, Ed Sheeran stated to his manager that the drum the part in Thinking Out Loud made it sound like Marvin Gaye. (Frank Dec., Exh. 13).

Response: Disputed. Defendants respectfully refer the Court to the email for its true and correct contents.

216. Ed Sheeran had heard Let’s Get It On at the time of writing Thinking Out Loud. Frank Dec., Exh. 12 (Sheeran Tr., p. 77:11-15).

Response: Disputed. The cited testimony states that Sheeran had heard LGO at some point in his life before writing TOL. He did not hear or listen to LGO “at the time of writing” TOL.

217. Ed Sheeran knew the words to the chorus of Let’s Get It On. At a concert in November 2014 in Zurich, Ed Sheeran performed the chorus of Let’s Get It On during the interlude of Thinking Out Loud. (Frank Dec., Exh. 2 (Video Exh. 1); Frank Dec., Exh. 12 (Sheeran Tr., p. 95-96, 110-111)).

Response: Disputed. The YouTube video in question shows that Sheeran knew the lyrics “Let’s Get It On” and “We are all sensitive people with so much to give, understanding now sugar” but that he knew none of the other lyrics.

218. The chorus of Let’s Get It On contains similar pitch sequences to the verses of Thinking Out Loud. (Stewart Dec., ¶ 58).

Response: Disputed. See Ferrara Decl. ¶¶ 23-26; Reply Ferrara Decl. ¶¶ 8-10.

219. The overall similarity of the harmony, anticipated second and fourth chords, basic bass line, minimizes any differences in pitch sequences between the pitch sequence of the chorus

of Let's Get It On sang by Ed Sheeran in Video Exhibit 2 and Thinking Out Loud. (Stewart Dec., ¶ 59-60).

Response: Objection – Stewart's opinion that the supposed similarities "minimize[] any differences" is not a "fact." Defendants also object to this statement as unintelligible – in particular, "minimizes any differences in pitch sequences between the pitch sequence of the chorus of Let's Get It On sang by Ed Sheeran in Video Exhibit 2 and Thinking Out Loud" makes no sense. To the extent Defendants understand this statement, they dispute the existence of the alleged similarities and they dispute Stewart's opinion that the supposed similarities "minimize[] any differences." See Ferrara Decl. ¶¶ 13-14, 48-50.

220. The LGO sheet music deposit copy and the LGO single version recording have the same form/structure. (Farkas Dec., Exh. 3 Ferrara Report, ¶¶ 11, 46).

Response: Disputed. Stewart previously opined that stark differences existed between the structures of the LGO Deposit Copy and the single version of the LGO Recording. See Stewart Tr. at 118:13-131:20; Stewart Report p. 2. Stewart has now disavowed that opinion because he believes it supports his rank speculation that the LGO Deposit Copy was derived from the single version of the LGO Recording, and not vice versa. Defendants do not dispute that Ferrara has opined that the LGO Deposit Copy and the single version of the LGO Recording have the same structure.

221. The overall melodies in the LGO Deposit Copy are substantially the same as the overall vocal melodies in the LGO Recording. (Ferrara Dec., ¶ 12).

Response: Undisputed. Defendants further clarify that the melodies in the LGO Deposit Copy and the LGO Recording, on the one hand, and TOL, on the other hand, are starkly different. See Ferrara Decl. ¶¶ 20-30; Reply Ferrara Decl. ¶¶ 8-10.

222. Melody B and Melody C are virtually identical in the LGO Deposit Copy and LGO Recording, and Melody A contains insignificant variances. (Ferrara Dec., ¶ 12).

Response: Undisputed. Defendants further clarify that the melodies in the LGO Deposit Copy and the LGO Recording, on the one hand, and TOL, on the other hand, are starkly different. *See Ferrara Decl. ¶¶ 20-30; Reply Ferrara Decl. ¶¶ 8-10.*

223. The defendants have only identified one song with the same I-iii-IV-V chord progression and anticipated second and fourth chords, “Georgy Girl,” that pre-dates Let’s Get It On. (Stewart Dec., ¶ 91).

Response: Disputed. In addition to two versions of “Georgy Girl” (1967), and “True Love Ways” by Peter & Gordon (1965) have the same I-iii-IV-V chord progression and anticipated second and fourth chords and predate LGO. *See Ferrara Reply Decl. ¶ 7, 18; Ferrara Report ¶¶ 155, 158-159; Reply Farkas Decl. ¶ 10, Ex. 21.* Moreover, the anticipation of chord changes is a commonplace musical technique. *See Ferrara Reply Decl. ¶ 7 and Ex. 22.*

224. The bass line for the first 24 seconds of TOL is performed on the guitar. (Stewart Dec., ¶¶ 24-25; Ferrara Report ¶¶ 50, 52, 60).

Response: Undisputed.

225. The basic bass line in TOL and LGO is 1-3-4-5. (Stewart Dec., ¶ 25; Ferrara Report ¶ 147).

Response: Disputed. The copyrighted work at issue (the LGO Deposit Copy) does not include a bass-line. *See Ferrara Decl. ¶ 4; Farkas Decl. Ex. 13.* Defendants further clarify that it is undisputed that the bass-guitar part in TOL (*i.e.*, the TOL Bass Line) and the bass-line in the LGO Recording are distinctly different, and that the “characteristics”

in common (as identified by Stewart) between the bass-guitar part in the LGO Recording and the TOL Opening Bass Line are objectively insignificant and were in common use prior to LGO. *See* Reply Ferrara Decl. ¶¶ 12-17.

226. The basic bass line is implied in the deposit copy of LGO by the chords and their placement. Stewart Dec., ¶ 3, 25.

Response: Disputed. Although it may be true that a bass line is implied in the deposit copy, the specific bass line in the LGO Recording – which features the purportedly “unusual choice” (Stewart’s words) of the “descending sixth” on which Stewart relies so heavily – is not implied. The deposit copy sets the parameters and bounds for what a bass-line may encompass – the bass-line must be in the same key, it must include notes in that key and be related to the chord progression, and it must be played in the same 4/4 meter. However, within those parameters, there are dozens of possible bass-lines that could be devised. Thus, it is objectively indisputable that the specific bass-line in the LGO Recording – which includes the purportedly “unusual” “descending sixth” – on which Stewart relies to claim similarity with TOL is not in the deposit copy. *See* Reply Ferrara Decl. ¶ 11; *see also* Ferrara Decl. ¶ 4.

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